TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

Federal

OTHER AUTHORITIES

A. BOOKS AND DIRECTORIES

AMICI CURIAE BRIEF OF NEW YORK, DELAWARE, MINNESOTA, NEVADA, NEW MEXICO, RHODE ISLAND, SOUTH DAKOTA and WASHINGTON

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears at 610 F. 2d 838. The Notice of Inquiry and Orders of petitioner Federal Communications Commission (FCC) appear at 57 FCC 2d 580, 60 FCC 2d 858, and 66 FCC 2d 78.

The texts are printed in full in the Appendices to petitioner FCC's Petition in No. 79-824. For convenience, reference to the decision below will be to both the official publication and the FCC's Appendices ("App.").

Consent of the Parties

Consent of the parties is not required since this brief on behalf of the States of New York, Delaware, Minnesota, Nevada, New Mexico, Rhode Island, South Dakota and Washington as Amici Curiae is sponsored by their respective Attorneys General. U.S. Sup. Ct. R. 36.

Interest of Amici Curiae

Amici have three major interests in this case. First, radio is important to the States' cultural and economic lives. Second, radio is a crucial medium by which the citizenry in general is informed of news and public affairs and through which minority groups in particular are brought into the mainstream of cultural and political life. Third, the decision herein may affect the varied patterns of local regulation of the burgeoning cable television industry.

A. Cultural and Economic Life.

As to the first concern, each of the States joining in this amici brief has a very real and substantial interest in promoting a vigorous cultural life. The availability of museums and concerts is important in creating an atmosphere where people will want to live and work, where managers will want to locate their businesses. New York's Legislature has formally recognized the importance of the arts to the State's "economy and tax base" as well as to its People's "educational, recreational and cultural activities" through attracting artists, industries related to the arts, and art lovers. See N.Y. Gen. Mun. Law §§ 303(1)(a)-(b); 326(1) (McKinney 1979 Supp.).[1] Proponents pointed out[2] that the major cultural institutions "have multi-million dollar payrolls [,] . . . spend millions of dollars annually for goods and services [and] . . . generate substantial sales tax revenues." They "attract people from all over the world to provide a reservoir of talent for such industries as advertising, film and television production, publishing, printing and graphic arts and fashion and industrial design. These industries spend about $884 million annually and generate $36.4 million in taxes." While New York is perhaps unique in the extent to which its economy depends on the arts, the arts are important to the economy and cultural life of every State.

[1] The provisions cited contain the legislative findings that were relied on by the New York Court of Appeals in upholding the constitutionality of the statutes. *Hotel Dorset Co. v. Trust for Cultural Resources of City of New York*, 46 N Y 2d 358, 369-70, 372 (1978).

[2] Chapter 903 of the Laws of 1976, Legislative Memorandum in Support, *New York State Legislative Annual-1976*, p. 195.

Radio plays an important part in promoting the arts, particularly music.[3] Radio enables less popular traditional musical styles (e.g., "big band" sound, classical music, jazz) to reach the new audiences they need if they are to survive.[4] It informs aficionados of events they can attend and records they can buy. The many tributes paid to the Metropolitan Opera broadcast series on its fortieth anniversary for inspiring new musical groups to form, performers to study and listeners to attend, were a dramatic example of radio's importance to creating concert hall audiences.[5] Radio can be even more important to the poor, the elderly, the handicapped and those who simply live far from a cultural center, for it brings into their homes the concerts they could not attend.

Each of the amici States has one or more stations in a major market city with an entertainment format that is

[3] The threatened loss of WNCN's unique classical music format led the New Jersey General Assembly, the New York City Council and about a dozen other local legislatures in Connecticut and New York to adopt resolutions calling on the FCC to act to preserve the format as a "unique cultural resource" and as "an integral and essential factor in maintaining" the region as "the leading musical [area] in the world." See, e.g., Res. Oct. 21, 1974, N.J. Gen. Assembly; Res. Dec. 16, 1974, White Plains Common Council; Res. 381 (Nov. 14, 1974), N.Y.C. Council.

[4] A national study conducted in the early 1970s indicated that radio was by far the leading source of classical music for the public. Television brought classical music to a few more people than radio over the course of a year, but radio slightly led records and tape and by far out distanced television and live performances as the leading source of symphonic music or opera for regular listeners. Ford Foundation, *The Finances of the Performing Arts*, vol. 2 (1974), Tables 5-6, p. 6; Tables B14-B23, pp. 86-91.

[5] For instance, the administrator of the Opera Theatre of Saint Louis, who founded the company five years ago and led it to its current million dollar budget season, commented that "if it weren't for the Met, we all wouldn't be alive, because the number of people who listen to it on the air is staggering, and that has educated our public." Jacobson, "The Spirit of Saint Louis", 44:22 *Opera News* 22, 23 (June 1980).

unique in that listening area. New York City has one of the country's only jazz stations, two very different classical music stations, a Caribbean music station and a single Country and Western music station. There is only one News and Information and one Beautiful Music station in Wilmington, Delaware. Minneapolis, Minnesota, has a jazz station and one specializing in religious programs. In Nevada, Carson City has a unique religious station while Reno has a Big Band and a News/Talk station.[6] Albuquerque, New Mexico, has two stations programming for different religious sects and a classical music station.[7] In Providence, Rhode Island, only one station offers Oldies[8] while in Sioux Falls, South Dakota, only one programs Beautiful Music.[9] Seattle, Washington, offers three different religious stations, an All News one and an AM/FM jazz station.[10]

Listeners frequently are devoted to particular music formats.[11] If a favorite station proposes to change format,

---

[6] See *Radio Programming Profile* (BF/Communications Services, Inc. Winter 1979), vol. 1, pp. 182-7, 196-213, 355-6; vol. 2, pp. 230-2.

[7] *Station Programming Profiles—Albuquerque* (Katz Radio July 1980).

[8] *Radio Programming Profile, supra,* vol. 1, pp. 257-60.

[9] 62:6 *SRDS Spot Radio Rates and Data* (Standard Rate and Data Service, Inc. June 1980), pp. 751-2.

[10] *Radio Programming Profile, supra,* vol. 1, pp. 310-7.

[11] Most of the radio audience listens to a number of different stations during the week (turning to news in the morning and to music at night, for instance, or hunting along the dial for a song). Review of the April/May 1978 Arbitron listenership surveys of the top ten markets showed that adults listened to an average of 2.6 stations per week. *Broadcasting* (October 9, 1978), p. 47. Similar calculations based on a later survey of the New York metropolitan area show that an average adult listens to 2.7 of the 45 radio stations with audiences large enough for sampling. See *ARB Jan./Feb. 1980* (Arbitron Inc.), pp. 70-1.

(footnote continued on following page)

they sometimes protest.[12] When they do so, they expect petitioner FCC, as the agency which licenses stations, to act. Thus, when WNCN in New York dropped its call letters and classical music format in favor of progressive rock in 1974, over 105,000 people signed petitions calling on petitioner FCC to hold hearings. Responding to their constituents, the Governors-elect of Connecticut and New York, twenty-three Congresspersons,[13] thirty-six New York State legislators,[14] the New Jersey General Assembly,[15] as well as about fifteen Connecticut and New York local legislatures, made inquiries and sought to induce petitioner

---

(footnote continued from preceding page)

In contrast, a large part of the audience for unique format stations listens only to its favorite station. For instance, the New York area survey showed that almost 71 thousand listeners tune only to the Country and Western station, about 39 thousand listen only to one of the classical music stations while over 19 thousand listen only to the other classical music station, and about 10 thousand listen only to jazz. *Id.* pp. 234-5.

[12] While the cases where citizens vigorously fought format changes are better known, it should be noted that many format changes are made between temporarily popular entertainment styles. An Arbitron survey of 500 stations in the top 25 markets indicated that between 1978 and 1979, for instance, less than ten percent of the Mellow, Good Music, Country, Classical and Jazz stations changed format while over twenty-five percent of the Adult Contemporary, Top 40 Disco, Progressive Rock, MOR [Middle of the Road], and Oldies stations did. *Broadcasting* (June 9, 1980) p. 46. When a fad passes, only a small group of partisans may regret a station's format change.

Even when a format is unique and well-established, its audience may not protest because they are not aware of their legal rights or because they prefer what they will be getting or do not care enough for what they are losing. Thus, in the past three years alone, unique classical music formats were abandoned without significant public protest in Baltimore, Sacramento and San Antonio.

[13] *N.Y. Times,* Nov. 30, 1974, p. 61.

[14] S. Res. 32, 1975-1976 Reg. Sess., N.Y.S. Legis.; A. Res. 85, 1975-1976 Reg. Sess., N.Y.S. Legis.

[15] Res. Oct. 21, 1974, N.J. Gen. Assembly.

FCC to act.[16] Comparable public protests involving local, State and Federal legislators were made in, for instance, the 1976 protest over the threatened loss of WRVR's unique Black jazz format in New York City and the 1976-8 protest over KMPX, a "big band" sound station in San Francisco. Whether the public protests attract audience interest or whether station managements simply work harder when they know how much their audiences care,[17] it is notable that in at least the cases of WNCN, WRVR and KMPX, the allegedly unprofitable format that "had" to be changed is still on the air, apparently at a profit[18] and certainly to the benefit of its listeners.

B. News, Public Affairs and Acculturization.

As to A nici's second concern, each of the States joining in this amici brief also has a very real and substantial interest in having its citizens informed of news and public affairs. Radio is a key means of serving that interest, for it is the primary daytime source of news for 46% of all adults nationwide.[19] Radio stations broadcasting only news have proliferated in the last decade. Providence,

---

[16] See, e.g., Res. 381 (Nov. 14, 1974), N.Y.C. Council; Res. Dec. 16, 1974, White Plains Common Council.

[17] A few months after the new licensee of KMPX agreed to retain the "big band" sound, the station manager attributed its "fattening advertising revenues" to both a better station management and an "increased share of audience. . . ." Carroll, "The Son of the Big Band Sound: A Return to Music of the Thirties," *San Francisco Examiner and Chronicle*, Dec. 23, 1979 (Datebook Section).

[18] The general manager of WNCN following its return to classical music format recently said, "Not only did we survive when everybody said we wouldn't survive—we prospered." Whitman, "A Station Rises, Phoenix-Like, From Its Own Ashes," 22:8 *Madison Avenue* (August 1980), p. 93.

[19] *Radio Facts* (Radio Advertising Bur. 1980), p. 11. A 1977 New York area survey indicated that in normal periods adults get 50% of their news from radio, 31% from television, 19% from newspapers and 1% from magazines. *Ibid.*

Reno, Seattle and Wilmington, for instance, each have one while New York City has two very different ones.[20]

Radio is particularly important in reaching minority racial and ethnic groups. Due to the problems of distributing publications in an economical, timely manner to wide-spread, relatively small clienteles, most print media serving minority groups are national publications, published weekly or less often.[21] Moreover, minority groups spend considerably more time listening to specialized formats aimed at their interests than to stations aimed at the general public.[22] Radio is not only a means by which minority groups receive information about the

---

[20] *Radio Programming Profile, supra*, vol. 1, pp. 196-213, 257-60, 310-7, 355-6; vol. 2, pp. 230-2.

[21] See generally *Minority/Ethnic Media Guide, USA 1980* (Directories International, Inc. 1979), Part I; Print Media, pp. 1-72. For instance, Ukrainians in New York City have a choice of one daily, two weekly, one biweekly and one five times yearly national newspapers and magazines but only one weekly local newspaper. The publications are available at several stores in traditional Ukrainian neighborhoods, but the Ukrainian population itself has substantially spread from those areas and must either travel considerable distances, subscribe by mail, or forego them.

[22] A 1978 survey indicated that 50% of all radio listening by Blacks was to Black stations and 41% of all radio listening by Hispanics was to "Spanish formatted" stations. "How Blacks and Spanish Listen to Radio (Report 4)" (Arbitron Co. 1978), p. 4.

Contrary to the usual radio listener's custom of listening to a number of different stations during the week, see p. 4 n. 11, *supra*, nearly 387 thousand persons in the New York metropolitan area listen only to one of the Black format stations and about 232 thousand listen only to one of the Spanish stations. *ARB Jan./Feb. 1980, supra*, pp. 234-5. During the course of a week, one of the leading New York City Black stations will have been listened to by over 778 thousand (42%) of the Black adults in the 28 county "Area of Dominant Influence". *Scarborough Report—New York Market 1980* (Scarborough Research Corp.), p. 22.

political process,[23] it is a focal point for shaping views and developing leaders on minority problems.[24]

Commercial radio stations in each of the amici States offer some foreign language programming. There are programs for most major ethnic groups, although most such programming is aired only a few hours a week at less popular times of the day and is rarely available throughout the State.[25] The importance of radio for ethnic minorities is illustrated most dramatically by Nevada where 41.7% of the population in 1970 reported a mother tongue other than English. Most of the Navajos there live in remote areas

[23] The Court has noted the role that an ethnic group's "cultural and language barrier" can play in making "participation in community processes extremely difficult, particularly . . . with respect to . . . political life." *White* v. *Regester*, 412 US 755, 768 (1973). Radio is a powerful tool by which the group can overcome the barrier.

[24] For example, it was reported, *N.Y. Daily News*, June 15, 1980, p. 7, col. 1, that the new Special Adviser for Hispanic Affairs to the Mayor of the City of New York had "establish[ed] the kind of political credibility that won him almost unanimous approval for the . . . City Hall post" by hosting a Spanish language public affairs radio program. "One of his conditions for taking the job was that he be allowed to keep his radio show." *Ibid.*

[25] Major ethnic groups that receive either no foreign language programming or very little (5 hours or less a week) include French, German, Italian, Polish, Spanish and Yiddish speakers in Delaware; Czech, Finnish, French, German, Polish and Swedish in Minnesota; French, German and Italian in Nevada; German in New Mexico; German, Greek, Hungarian, Russian, Slovak, Swedish, Ukrainian and Yiddish in New York; French and Italian in Rhode Island; German in South Dakota; and Czech, Dutch, French, German, Greek, Italian, Polish, Russian and Serbo-Croatian in Washington. *See Minority/Ethnic Media Guide, supra*, pp. 118, 124-8, 131-4, 148, 158-9, 163, 166, 176, 178, 184-6, 192, 194-5; U.S. Bureau of Census, *1970 Census of Population, Characteristics of Population*, vol. 1, pt. 9 (Delaware), Table 142, p. 191; *id.*, vol. 1, pt. 25 (Minnesota), Table 142, p. 514; *id.*, vol. 1, pt. 30 (Nevada), Table 142, p. 213; *id.*, vol. 1, pt. 33 (New Mexico), Table 142, p. 272; *id.*, vol. 1, pt. 34 (New York), sect. 2, Table 142, p. 722; *id.*, vol. 1, pt. 41 (Rhode Island), Table 142, p. 269; *id.*, vol. 1, pt. 43 (South Dakota), Table 142, p. 319; *id.*, vol. 1, pt. 49 (Washington), Table 142, p. 359.

and do not have access to television. Few of them are literate in English or the recently developed written Navajo language. They thus depend for news and public information primarily on one radio station broadcasting 10 hours a week in Navajo and another splitting 50 hours a week between Zuni and Navajo.[26] Considering, therefore, how relatively little ethnic and racial minority programming there is, it is a surprisingly strong force assisting certain minority groups to integrate themselves into the nation's majority culture without losing their own roots and other groups to participate without losing their separate identities.

C. Local Regulation of Cable Television.

Finally, each of the States joining in this amici brief has a very real and substantial interest in local regulation of community antenna television (CATV) or cable television systems. A decision herein on broad First Amendment grounds might have implications for local regulatory action. The People of the State of Delaware have a unique and specific interest in the regulation of signal content in the context of cable carriage because Delaware has no indigenous commercial television station.

New York permits local government to grant cable franchises, N.Y. Exec. Law § 819,[27] but the State Commission on Cable Television retains the final authority to grant or deny a certificate of confirmation. N.Y. Exec. Law § 821. The Commission is "to promote . . . [a cable industry] responsive to community and public interest" and

[26] *Minority/Ethnic Media Guide, supra*, pp. 132-3.

[27] Small cable systems (fewer than 50 subscribers), most master antenna systems and subcontracting leasors are exempt. N.Y. Exec. Law § 812(2) (McKinney Supp. 1979).

There are two different sets of §§ 811 *et seq.* in the Executive Law. The sections cited herein are Article 28 (McKinney Supp. 1979).

to set standards and rules "to assure that cable television companies provide adequate, economical and efficient service to their subscribers, their municipalities . . . and other parties to the public interest." N.Y. Exec. Law § 811. Censorship is prohibited, N.Y. Exec. Law § 829,[28] but an affirmative obligation to provide access channels is imposed, N.Y. Exec. Law § 815(2)(b), and the Commission is to "encourage . . . developing programming for the public interest," N.Y. Exec. Law § 811.

The cable industry has grown rapidly in New York, in terms both of franchises and subscribers.[29] It is expected to continue rapid growth.[30] The State Commission is exploring whether there is sufficient cable capacity to meet

[28] Under N.Y. Exec. Law § 829 subdivision (a), the Commission is not to promulgate any rule or regulation which would interfere with the right of free speech by cable. Under subdivision (b), the franchising municipality may not prohibit, limit, or impose discriminatory or preferential fees to encourage or discourage, particular programs or classes or types of programming. Under subdivision (c), no cable company can prohibit or limit any program or class or type of programming presented over a leased channel or over a channel made available for public access or educational purposes.

[29] There were 556 franchises serving about 800 thousand subscribers in 1976. By 1979 there were 679 franchises and 1.2 million subscribers. N.Y.S. Com'n on Cable Television, *Cable Communications in New York State: An Agenda for Government Involvement* (Docket No. 90112) (August 1979), Appendix A, "Statistics: Cable Television Service in New York State", pp. 176-7, 181.

[30] As of June 1979, there were 246 franchise applications "in process." Short-run projections were for 500 thousand additional subscribers in the New York City area, 165 thousand in neighboring counties, and 65 to 70 thousand in major urban areas upstate. *Id.*, pp. 175-6, 179.

Nationally and in New York about one in five households had cable service in 1979. With the estimated 730 thousand new subscribers statewide, about 1.9 of New York's 6.5 million households, or 30%, will be connected.

needs in view of the large number of local systems with no or few unused channels.[31]

Delaware's Public Service Commission has "exclusive original jurisdiction and regulation" over most of the State's cable systems. Those municipalities which had express or implied charter powers in June 1974 to grant franchises continue to have those powers, but the Commission has "supervision and review jurisdiction and regulation" over them. 26 Del C. § 201.[32] In particular, the Commission can change or modify a municipality-granted franchise "whenever the public interest requires" and can issue a franchise if a municipality's refusal of one "is not in the public interest. . . ." 26 Del. C. § 608. All other cable systems[33] are franchised and regulated directly by the Commission. 26 Del. C. § 601. County franchising and regulation has been preempted. 26 Del. C. § 616.[34]

The State of Minnesota's regulatory system is quite similar to New York's. Local government grants franchises in accordance with standards to protect "the public interest" and procedures set by the State Cable Communications Board. Minn. Stat. §§ 238.01, .02(5), .04(1), .05, .08(1) (1978). The Board has final authority to confirm or refuse operating permission. Minn. Stat. § 238.09 (1978). Censorship by the Board or a cable company is prohibited. Minn.

[31] *Id.*, pp. 91-2; Appendix B, "Inventory of Cable System Channel Capacity", pp. 183-193.

[32] The Delaware statutes cited herein are published in the 1978 Cum. Supp.

[33] Small cable systems (fewer than 50 subscribers), master antenna systems and subcontracting leasors are exempt. 26 Del. C. § 102(4).

[34] Pre-June 1974 cable systems under municipal or county franchises, and even those without franchises, were given certificates of "public convenience and necessity" by the Commission, 26 Del. C. §§ 203(b), 607-8, but were required to come into compliance with the same conditions as operators subsequently granted franchises by the Commission, or risk revocation, 26 Del. C. §§ 606-8.

Stat. § 238.11 (1978). Access channels must be provided, Minn. Stat. §§ 238.05(2)(b), .17(3)(b) (1978), and the State Board is to encourage development of programming for the public interest, Minn. Stat. § 238.01 (1978). Two significant differences from New York are that two or more municipalities can by ordinance set up a Joint Cable Communications Commission to exercise the member municipalities' franchising powers, Act of April 24, 1980, Ch. 614, § 124, 1980 Minn. Sess. L. Serv. 1308 (West), *to be codified as* Minn. Stat. § 238.08(5), and municipalities are not prohibited from encouraging or discouraging types or classes of programming.

The Nevada Public Service Commission supervises and regulates cable television as a public utility. NRS 704.020(f), 711.030, .040, .050, .140 (1979). It issues a "certificate of public convenience and necessity" based on a showing of "public need for the proposed service or acquisition." NRS § 704.330(1), 711.090 (1979). Local government power to franchise and regulate cable has been preempted. 1974 [Nev.] Att'y Gen. Op. No. 174; 1964 [Nev.] Att'y Gen. Op. No. 128. This Court has upheld the Nevada regulatory system against claims that it unduly burdened interstate commerce, that it had been preempted by Federal statutory or regulatory action, and that it violated due process by promoting destructive competition. *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D. Nev. 1968) (3-judge court), affd. 396 U.S. 556 (1970).

The State of New Mexico does not regulate cable television.[35] Municipalities have franchising power under the

[35] The only statutes explicitly referring to cable television are the prohibition on theft of services, N.M. Stat. Chap. 63, Art. 10 (1978), and the provisions to prevent excavation damage to cable television lines, N.M. Stat. Chap. 63, Art. 11 (1978). There is also explicit authority for counties or municipalities to fund television translator stations (i.e., relay stations to boost power and rebroadcast a signal) that were not originally and are not now run by a commercial television station. N.M. Stat. §§ 5-2-1,-2 (1978).

home rule provisions of the State Constitution, Art. 10, § 6. See 1972 Op. [N.M.] Att'y Gen. No. 72-29.

The State of Rhode Island franchises and regulates cable through its Division of Public Utilities and Carriers. Local government has no statutory role in the process. R.I. Gen. L. §§ 39-19-3,-6.[36] Franchise applicants must show "that the proposed operation will be consistent with the public interest". R.I. Gen. L. § 39-19-4. The Division is to "supervise and regulate . . . so far as may be necessary to prevent such operation from having detrimental consequences to the public interest . . .". R.I. Gen. L. § 39-19-6. The Public Utilities Commission, a separate body from the Division but chaired by the Division's Administrator, R.I. Gen. L. § 39-1-3, can revoke, suspend or alter an operator's certificate after a hearing for "willful violation" of the statutes, R.I. Gen. L. § 39-19-8, presumably including failure to serve the public interest. The Commission may also "revoke or refuse to renew the license of any CATV company whose programs originating within this state are offensive to commonly accepted standards of morality and decency of the community." *Id.*

The State of South Dakota has delegated all regulatory and franchising authority to local government. S.D.C.L.

[36] Until Chapter 240 of the Public Laws of 1969, enacting R.I. Gen. L. §§ 39-19-1 *et seq.*, the State had no laws explicitly dealing with cable. In *Nugent* v. *City of East Providence*, 103 R.I. 518, 523, 238 A.2d 758, 761 (1968), the Court held that the general power to license, regulate and charge fees for occupations and businesses was an attribute of sovereignty pertaining to the State and could not be exercised by local goevrnment absent delegation in express terms or by necessary implication. It further held that neither the home rule provisions of the State constitution nor statutes authorizing municipalities to acquire, hold and dispose of property, under certain circumstances, conferred the right to regulate a business. *Id.*, 103 R.I. at 524-7, 238 A.2d at 762-3. It declined to rule on whether cable was a public utility. *Id.*, 103 R.I. at 529, 238 A.2d at 764. Chapter 240 codified the case's holding and defined cable as a "communications carrier", subject to the Division's jurisdiction. R.I. Gen. L. § 39-19-2. The Rhode Island statutes cited herein are General Laws of 1956 (Reenactment of 1977).

§§ 9-35-17,-18 (Supp. 1979).[37] Municipalities "may prescribe reasonable quality standards", S.D.C.L. § 9-35-20 (Supp. 1979), clearly including signal quality but arguably including overall service quality.

Cable is considered a "communication utility" in the State of Washington. RCW 35.96.020, 36.88.420 (1967). A company using the public ways for wire or cable communications must obtain a franchise from local government, RCW 35.27.330 (1965),[38] and if necessary, a right of way from the county, RCW 36.55.010 (1963). The newly reorganized Public Broadcasting Commission has been mandated to encourage the development of a State system of public, not-for-profit broadcasting, including cable television, but may not operate its own station or originate its own programs. Sections 2-4, 8, Chapter 123, Laws of 1980, amending Chap. 28A RCW.[39]

---

[37] Until the enactment of Chapter 52 of the Laws of 1972, the State had no laws explicitly dealing with cable. In *Aberdeen Cable TV Service, Inc.* v. *City of Aberdeen*, 85 S.D. 57, 62-3 (1970), cert. den. 400 U.S. 991 (1971), the Court found that S.D.C.L. § 9-35-3 was nonetheless applicable. The use of local streets for the system's wiring was held to make cable a "common carrier" subject to the State Public Utility Commission's supervision and to require approval of franchises by local voters.

In response, the Legislature enacted Chapter 52. The new laws specifically found that cable required local regulation, S.D.C.L. § 9-35-17 (Supp. 1979), and gave municipalities "exclusive jurisdiction" to approve franchises, among other things, "by ordinance" and "[n]otwithstanding the provisions of § 9-35-3 . . ."; that is, without submitting the proposition to a vote of the electors. S.D.C.L. § 9-35-18 (Supp. 1979).

[38] After obtaining a franchise for one purpose, e.g., telephone, the company does not have to apply for a separate franchise to operate a CATV system. Ops. [Wash.] Att'y Gen. 65-66, No. 92.

[39] Washington also permits a county without a CATV system to set up a Television Reception Improvement District to raise funds for the construction, maintenance and operation of a television translator station. A county with CATV can also establish such a District if it has a translator station established before August 1971. RCW 36.95.020 (1971). Before establishing a District, the Board of County Commissioners must decide, after a public

(footnote continued on following page)

Summary of Argument

Citizens own the airwaves and lease radio frequencies to broadcasters on terms and conditions to use as trustees for limited periods. One of those conditions is that broadcasters serve the "public interest".

Under this Court's decisions, citizens have a right to a diversity of formats on the airwaves under the "public interest" standard of the Communications Act of 1934 and under the First Amendment. Without judging the value or merit of a particular radio station format, petitioner FCC can determine whether it is duplicative of other formats in the listening area. Would-be broadcasters who propose duplicative formats need not be granted licenses. Licensees who have lessened diversity by abandoning a unique format need not be granted a renewal.

When citizens see that their property has been misused, they have a First Amendment right to petition for redress of their grievances to petitioner FCC. Petitioner FCC can and should develop reasonable standards to accommodate both listeners' and broadcasters' First Amendment rights in the infrequent situations where the market does not adequately protect diversity on the airwaves.

Cable television is largely a matter for State regulation and a wide variety of very different approaches are being followed in response to local conditions. The decision below was made in the context of an unusual administrative proceeding and a different regulatory and statutory system. To protect the freedom of the States to explore other possible regulatory approaches, the Court is respectfully urged to note that its decision herein need not necessarily apply to State regulation of cable television systems.

(footnote continued from preceding page)

hearing, that it "would serve the public interest." RCW 36.95.040, .050 (1971). Once established, the District station must "serve the public interest, convenience, and necessity . . ." RCW 36.95.-010 (1971). It may not originate programs. RCW 36.95.130(2) (1971).

POINT I

Radio listeners are entitled under the First Amendment and the Federal Communications Act of 1934 to diversity on the air. When a licensee threatens to deny listeners their entitlement, they have a right under the First Amendment and the Communications Act to petition the Federal Communications Commission to protect that diversity.

This Court held in *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969), that:

> "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC."

Red Lion upheld the Fairness Doctrine, requiring licensees "to give reply time to answer personal attacks and political editorials", *id.* at 396, and noted that the FCC, *id.* at 395:

> "neither exceeded its powers under the [Communications Act] nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943)."

In *NBC* v. *United States, supra,* the Court had held that denial of a station license under "the public interest, convenience, or necessity" standard of the Communications Act of 1934, 47 U.S.C. §§ 307(a), (d), 309(a), 310 and 312,[40] was "not a denial of free speech". 319 U.S. at 227. It specifically interpreted the "public interest" criterion to permit the FCC to refuse a license to a person, even though "financially and technically qualified", who wished to "present a single service over . . . two stations" in one area. *Id.* at 218.

The Court was presented with format issues in *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), but resolved the case on other grounds. The Sanders Brothers, licensee of an existing 24-hour radio AM station, had sought to intervene before the FCC in opposition to a construction permit application for a competing day-time only station. The existing station intended to continue offering "sponsored network programs", while the permit applicant planned

> "a program service especially designed to serve the agricultural and educational needs of the surrounding rural area 'far more comprehensive in scope than programs of the same general character now broadcast by [the Sanders Brothers station]': and [to] broadcast

---

[40] The standard is set forth explicitly in the first four of the cited provisions as a condition for granting, renewing or approving the transfer of a station license or for granting a construction permit. Section 312, the fifth provision, originally covered both revocation (subdivision a) and modification (subdivision b) of licenses and construction permits. Chapter 879, July 16, 1952, 66 Stat. 716, amended § 312 extensively and transferred the substance of subdivision b, including its express use of the "public interest" standard for modifications, to its present location in § 316(a). Subdivision a of § 312 has never explicitly incorporated the "public interest" criterion, but arguably that standard has always been implicit in the authority to revoke a station license or construction permit for conditions "which would warrant refusing to grant a license or permit on an original application . . ."

> stock market reports daily, while [the Sanders Brother Station] does not and will not." *Sanders Brothers Radio Station* v. *FCC*, 106 F. 2d 321, 325, 326 (D.C. Cir. 1939) [quoting from FCC brief], revd. 309 U.S. 470 (1940).

The Circuit Court found that the different formats offered might give rise to economic competition and that the FCC had to consider possible injury to an existing station before granting a construction permit. *Ibid.*

In reversing, this Court noted the primacy of listeners' rights over broadcasters, 309 U.S. at 475-6:

> "Plainly it is not the purpose of the [Federal Communications] Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public . . . We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license."

At the same time, the Court noted that totally unregulated competition between stations with different formats was not within the intent of the Communications Act. The FCC was required to consider economic loss to stations with competing formats in terms of its effect on the service provided listeners as one of the factors under the public interest standard. *Id.* at 476. If, for instance, the new station's format was not likely to attract enough listeners to become profitable but instead to draw enough listeners and advertising revenue from the existing station's format to render it unprofitable, then the FCC should consider the potential loss to listeners of the services of both formats due to economic injury as a factor in determining whether

to issue a license. *Ibid.* In the case at hand, the Court found adequate support in the record for the FCC's determination that "there was need . . . for the services of both stations", and that the public interest, convenience, and necessity would be served by granting the construction permit. *Id.*, at 472, 475.

Listeners seeking to enforce their rights under this Court's decisions unfortunately have repeatedly seen petitioner FCC treat their claims with "[a] curious neutrality-in-favor-of-the-licensee", to use Mr. Chief Justice, then Circuit Judge, Burger's phrase in an analogous case, *Office of Communication of the United Church of Christ* v. *FCC* (II), 425 F. 2d 543, 547 (D.C. Cir. 1969).

In the original *Office of Communication of the United Church of Christ* v. *FCC* (I), 359 F. 2d 994, 1006 (D.C. Cir. 1966), then Circuit Judge Burger held that the FCC had to allow standing to one or more members of the public to assert and prove their claims in their petition to deny renewal of a television station license. Those claims included format issues[41] as well as violations of the Fairness Doctrine.

The decision in *UCC* v. *FCC* (I) clearly contemplated that in future license renewal proceedings, listeners would intervene to assert their legitimate interests in such format issues as "programming deficiencies or offensive overcommercialization." *Id.* at 1005. Mr. Chief Justice Burger even suggested, *ibid.*, that the FCC recognize that "'[s]ome consumers need bread; others need Shakespeare . . . [and] consider the people's needs more significant than administrative convenience.' [Cahn,] *Law in the Con-*

---

[41] Petitioners claimed the station "failed to serve the general public because it provided a disproportionate amount of commercials and entertainment", *id.* at 998, and because its programs gave "very much less television exposure" to Negro individuals and institutions than to others and were "generally disrespectful toward Negroes". *Id.* at 998 n. 4.

sumer Perspective, 112 U. Pa. L. Rev. 1, 13 (1963)." He noted that, 359 F. 2d at 1003:

> "A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty."

Mr. Chief Justice Burger's observations in *UCC* v. *FCC* (I) were, of course, the precedential base for the first format case, *Citizens Committee to Preserve the "Voice of Arts in Atlanta"* v. *FCC,* 436 F. 2d 263, 272 (D.C. Cir. 1970), and remain largely applicable to the present Format Inquiry on certiorari review.

Reviewing programming issues, this Court has recognized that the First Amendment and the "public interest" standard of the Communications Act entitle listeners to variety in the radio programming aired, including the esthetic experience provided by it. *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 390; *NBC* v. *United States, supra,* 319 U.S. at 217-8. It might even be permissible in some instances to override a broadcaster's journalistic judgment in selecting programs although dilution of licensee responsibility for programming is not favored, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 131 (1973) (BURGER, C.J., opinion of the Court), and it is preferable for the FCC to state the goal to be met (*e.g.,* Fairness in covering public affairs, no indecent language), allowing broadcasters discretion in programming to meet that obligation at peril of losing their licenses if the FCC finds that the programming aired has failed to achieve that goal.[42] *FCC* v. *Pacifica Foundation,* 438 U.S. 726, 748-51 (1978); *CBS* v. *DNC, supra,* 412 U.S. at 131 (BURGER, C.J., opinion of the Court); *id.,* 412 U.S. at 132, 135 (STEWART, J., concurring). One goal implicit in the Communications Act is to foster diverse formats and in granting a license, the FCC is to consider possible economic injury to competitors with different formats only insofar as it affects (*e.g.,* through station failure) the adequacy of service to listeners and the public interest. *FCC* v. *Sanders Brothers Radio Station, supra,* 309 U.S. at 476. Moreover, the FCC may refuse a license to a broadcaster whose proposed programming would lessen, or fail to enhance, diversity. *NBC* v. *United States, supra,* 319 U.S. at 218. If, then, a broadcaster proposes to abandon a unique format, one found to foster diversity and serve the public interest, nothing in this Court's decisions prevents the FCC from denying him a license for that frequency.[43]

---

[42] Evaluation of a station format's uniqueness could be accomplished with a minimum of intrusiveness. See p. 24 n. 48 *infra.* It connotes no approval or condemnation of content (while trash is quite common on the air, unique trash is still unique). To the extent that consideration of programming in license decisions might be viewed as content-based regulation, it is no more intrusive than review of the content of the expression in libel, commercial speech or obscenity cases. See *Consolidated Edison Co. of New York, Inc.* v. *Public Service Com'n of New York,* —— U.S. ——, 100 S. Ct. ——, 48 USLW 4776, 4778 n. 5 (June 20, 1980).

[43] If a prospective licensee's arguable free speech right to offer a duplicative format, see Brief of Insilco Broadcasting Companies, Point II, outweighed radio listeners' right to diverse formats, *NBC* v. *United States, supra,* 319 U.S. at 218, on the initial grant of license, then it might not be permissible to deny a governmental benefit, renewal of a license, because the broadcaster had diminished diversity. See *Branti* v. *Finkel,* —— U.S. ——, 100 S. Ct. 1287, 1293 (1980), citing *Perry* v. *Sindermann,* 408 U.S. 593, 597-8 (1972); *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). But *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 390, establishes that the First Amendment interest of listeners in diverse formats outweighs the rights of current or potential broadcasters. Consideration of the extent to which a format is unique is thus permissible in both granting and renewing licenses.

The question presented by the decision below is whether listeners have the right to call to account a broadcaster who freely chose to adopt a unique, financially viable[44] format and built up a substantial audience for it, but later proposes to abandon that format and its listeners (610 F. 2d at 842-3, 851; App. 4a-8a, 24a-25a).[45] It is not "program supervision" or "editorial control" to review what has already been broadcast to see if it met with the public interest in unique formats. Cf. *CBS* v. *DNC, supra; FCC* v. *Pacifica Foundation, supra.* It does not interfere with editorial selection of individual programs to inform an applicant that he will not receive a license for a duplicative format. *NBC* v. *United States, supra.* How then does it become impermissible to tell a broadcaster that his application will be favored if it promises a unique format and may be denied if he abandons a format that has well served the public interest?

Amici will not attempt to address herein petitioners' multifarious objections to consideration of formats in licens-

[44] In many cases the financial viability question will be more important than uniqueness. A common thread linking many of the format cases thus far has been listener allegations of deliberate station mismanagement in order to justify abandoning a unique format as unprofitable. There is thus added significance in the fact that most format cases have been settled with the old format preserved or restored and that most such stations appear to be operating at a profit. See p. 6, *supra.*

[45] The court below noted that its decision applied to consideration of format changes as a factor in granting initial license applications, license renewals, or approval of transfer applications, but did not require FCC approval of format changes during a license's term (610 F. 2d at 849 & n. 29; App. 20a & n. 29).

ing.[46] We do believe it important to note that the decision of the court below does not prescribe *how* petitioner FCC must treat format questions; it merely requires petitioner FCC to make an honest attempt "to develop administrative standards instead of simply abdicating . . . " (610

[46] Many of petitioners' arguments are restatements of those raised and answered below. Thus, the Court of Appeals' format decisions do not require petitioner FCC to regulate formats in all cases; they presume market forces will ordinarily provide diverse formats. All that *is* required is that petitioner FCC consider format change as a factor in evaluating a licensee's performance under the public interest criterion of the Communications Act (610 F. 2d at 851; App. 24a-25a). So viewed, the format decisions no more impose common carrier obligations, violate the First Amendment, or constitute censorship than does the Fairness Doctrine (610 F. 2d at 851-2, 854-5; App. 26a, 31a, 33a). Requiring broadcasters to meet programming requirements in order to receive a license or renewal no more infringes their right to free speech than requiring motorists to agree to obey traffic laws infringes their fundamental personal, unconditional, *Dunn* v. *Blumstein*, 405 U.S. 330, 388, 341 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), right to travel. Petitioner FCC does not appear to have seriously attempted to implement the format decisions, and its administrative impossibility objections seem captious (610 F. 2d at 849-54; App. 21a-32a). See p. 24 nn. 47-8, *infra.* The format decisions have not, on petitioner FCC's own showing, stifled innovation (610 F. 2d at 851; App. 25a), and the format decisions do rely on competition for diversified programming except when it is clear the market has failed (610 F. 2d at 851; App. 24a).

The court below was careful to preserve a proper relation with the agency by giving all due deference to petitioner FCC's interpretation of its statute but reluctantly recognized that that interpretation could not be sustained. It left petitioner FCC free to develop an interpretation consistent with this Court's decisions and to implement that reading of the statute (610 F. 2d at 852-5; App. 27a-33a).

Not surprisingly, petitioners have abandoned in this Court their "administrative nightmare" argument (610 F. 2d at 847-9, 857; App. 17a-20a, 38a). They do not attempt to explain the apparently serious procedural irregularities (610 F. 2d at 846-7, 850, 856; App. 14a-17a, 22a-23a, 34a-35a).

The new arguments in this Court on legislative history and statutory interpretation appear to be a reversal of the government's position in *NBC* v. *United States, supra,* where the Solici-

(footnote continued on following page)

F. 2d at 852; App. 27a).[47] A wide variety of approaches have been suggested (610 F. 2d at 852-4; App. 28a-32a). Amici Attorneys General respectfully submit that reasonable standards can be developed, standards that will satisfy both broadcasters' limited First Amendment right to freedom of speech and listeners' First Amendment entitlements to diversity on the air and to petition for redress when such diversity is denied them, for the "infrequent situations" (610 F2d at 854; App. 31a) where petitioner FCC must look at formats.[48]

(footnote continued from preceding page)

tor General and petitioner FCC argued that the statutory language and legislative history of the Communications Act authorized the agency to promulgate regulations affecting programming and that those regulations were constitutional. The new arguments are, in any event, on the whole irrelevant. The fact that Congress refused to give preference to one type of programming over another, Brief for FCC, Point I.B, for instance, in no way implies that Congress did not want petitioner FCC to foster diversity of formats.

[47] The Court of Appeals did not fail here to provide specific answers to the objections raised by petitioners as it had in *CBS* v. *DNC*, *supra*, 412 U.S. at 126. It answered them directly and thoroughly (610 F. 2d at 848-9, 851-4; App. 18a-20a, 24a-26a, 29a-31a). But having shown why the objections were invalid, it was careful not to fall into the complementary error of providing an excessively detailed outline of how petitioner FCC should carry out its responsibilities.

[48] Changing duplicative formats has thus far prompted few if any listener protests. The FCC could, therefore, reasonably presume a format was unique if its change elicted significant listener grumbling.

As a practical matter, determining whether a format is unique is usually not likely to be difficult. Whether a station is the only one in a listening area offering a particular entertainment format, see pp. 3-4 *supra*, all-news, see pp. 6-7 *supra*, or programming directed to a particular ethnic or racial minority, see pp. 7-9 *supra*, can often easily be determined by reference to the licensing forms on file with petitioner FCC. Less elegantly but even more easily, the self-descriptions of station formats published in several industry directories, e.g., *Minority/Ethnic Media Guide*, *supra*, could be consulted, as was done in this Brief.

(footnote continued on following page)

As amici for States with considerable interests in the protection and encouragement of unique radio formats, see "Interest of Amici Curiae" *supra*, we are concerned that our citizens' voices be heard when they assert their First Amendment right to petition for redress of grievances as to the use of the airwaves, a valuable, limited property, see *UCC* v. *FCC* (I), *supra*, 359 F. 2d at 1003, which, all concede, belongs to them. Unfortunately, the "deep-seated aversion" displayed by petitioner FCC to considering format issues (610 F. 2d at 849; App. 21a) precludes reliance on its taking independent action to protect the public interest in this area. As in *UCC* v. *FCC* (I), *supra*,

---

(footnote continued from preceding page)

A slightly more difficult task is posed when two stations in the same market offer, for instance, all-news or Black-oriented programming. A more fine-grained analysis considering, e.g., if one news station programmed repetitive modules of news several times an hour while the other emphasized in-depth coverage of a few stories, whether one Black station concentrated on religious programming and the other on popular music, could easily be made using the same sources. It seems clear that petitioner FCC could make such analyses with little or no review of individual programs. It produced such an analysis in this proceeding (610 F. 2d at 853; App. 30a).

Petitioner FCC's arguments are based on the assumption that it would have to probe formats down to the level of individual music selections. Nothing in the decisions of the court below would require such a result if petitioner FCC conducted an unprejudiced Inquiry that developed "a rational classification schema" (610 F. 2d at 853; App. 29a) for a less intrusive determination of uniqueness. In *Citizens Comm. to Save WEFM* v. *FCC*, 506 F. 2d 246, 264-5 (D.C. Cir. 1974), for instance, the court below gave deference to petitioner FCC's "expertise to make reasonable categorical determinations" and noted that the question of uniqueness arose because the licensee described the format it wished to abandon as "classical music" while the substitute station described its format as "fine arts." Although the *WEFM* court noted that one classical music format may be sufficiently different from the other's that the loss of either would lessen diversity, 506 F. 2d at 264 n. 28, it left open the question of whether the FCC could find them to be "rough substitutes" without a hearing on that issue. *Id.* at 265.

where listener action was needed to induce the FCC to look critically at the racially biased programming of the licensee, so too here petitioner FCC needs "the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general," 359 F. 2d at 1003, by providing a "listener appraisal of a licensee's performance," *id.* at 1007, and by assisting the agency to evaluate if the public interest has been served, *id.* at 1004-5. Amici submit that the court below correctly held that listeners are entitled under the First Amendment and the Communications Act to diversity in radio formats and to petition for redress when a unique format is threatened.

POINT II

To assure that the freedom of the States to explore other possible regulatory approaches is preserved, the Court should explicitly note that its decision herein on Federal regulation of radio need not necessarily apply to State regulation of cable television systems.

The decision under review herein is singular. It involves suggestions of, in the true sense of the word, extraordinary behavior by the regulatory agency (610 F. 2d 846-7, 850, 856; App. 14a-17a, 22a-23a, 34a-35a).[49] Moreover, resolution of the issue involved, consideration of format changes in radio licensing decisions, is profoundly influenced, and perhaps controlled by, the statutory context of the Communications Act. See Point I *supra*.

The Court has noted that petitioner FCC has only "a circumscribed range of power to regulate cable television" under the Communications Act. *FCC* v. *Midwest Video Corp.* (II), 440 U.S. 689, 696 (1979), citing *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp.* (I), 406 U.S. 649 (1972). The FCC's jurisdiction over cable is limited to that "reasonably ancillary to . . . effective . . . regulation of television broadcasting." *United States* v. *Southwestern*

---

[49] At points, the court below seems to question the right of the administrative agency to review the court's decisions (610 F. 2d at 850; App. 22a), while petitioner FCC questions the Court of Appeals' right to review the agency's policy decisions. Brief for FCC, Point II. Amici Attorneys General respectfully submit that both are over-reacting, perhaps because the long confrontation between them (610 F. 2d at 850; 21a) has led them to behave less like working partners than strangers (610 F. 2d at 860; App. 44a) (LEVENTHAL, J., concurirng).

It is not infrequent for one of the State administrative agencies amici Attorneys General represent to receive a lower court decision which it regards as wrong. As long as the agency ap-

(footnote continued on following page)

Video Corp., supra, 392 U.S. at 178. The Court has noted that the First Amendment rights of cable operators may differ from those of broadcast licensees. *United States* v. *Midwest Video Corp.* (II), *supra*, 440 U.S. at 707 n. 17.

The individual States continue to franchise cable systems and, except to the extent that the FCC has preempted jurisdiction, to regulate them. As illustrated by Amici herein, see pp. 9-14 *supra*, the States have adopted a wide variety of regulatory systems in response to local condi-

---

(footnote continued from preceding page)

proaches the decision with deference to the court's legal rulings and with a mind open to be persuaded on the facts, we see nothing wrong in the agency's conducting an inquiry to re-evaluate its policy. Indeed, we would argue that the agency could properly come to the conclusion that its original policy was correct and attempt so to convince the court in future litigation.

Administrative agencies must be free to re-examine their policies in the light of new facts and judicial decisions. This should include the freedom to readopt a previous policy, as long as the determination to do so is made fairly, with an open mind on all the evidence and consistent with the courts' legal rulings as to the agency's powers under its organic statute. Cf. *Association of National Advertisers* v. *FTC*, —— F. 2d ——, 48 LW 2434 (D.C. Cir. Dec. 27, 1979).

The difficulty in the present case is that the record showed, in the view of the Court of Appeals, agency "aversion and "hostility" toward the Congressional policy embodied in petitioner FCC's organic statute which, as interpreted by this Court and the Court below, see pp. 16-21, *supra*, requires the agency to promote diversity of formats (610 F. 2d at 850; App. 21a) (McGowan, J.); (610 F. 2d at 860; App. 44a-45a) (Leventhal, J., concurring). This error was compounded by "an almost cavalier disregard for the public's right to comment" (610 F. 2d at 858; App. 41a) (Bazelon, J., concurring in vacating the FCC's decision).

Amici Attorneys General submit, therefore, that if the issues of agency/court relations or of policy/statutory interpretation are reached, their resolution should be explicitly limited to the facts herein. The Court can condemn the unusual practices apparently followed by petitioner FCC without limiting the freedom of other administrative agencies following fair procedures and adhering to judicial precedent to re-examine their policies without being either mandated to change or foreclosed from adhering to prior policy.

tions. Some treat franchising power separately from regulatory power. Some place all authority at State level, others at local level and some place some authority at both levels. Some States lodge power in a utility commission, some in an office thereof, others in a separate agency. Some class cable as a public utility, but others do not, including some States that nonetheless use their utility commission to regulate cable. The extent of regulatory power and the standards under which the local regulators function are equally varied.[50]

In analogous areas such as criminal and juvenile justice, where Federal jurisdiction is indirect and there is no Federal rule, where the matter is of local concern and is locally regulated, where the various States have adopted differing solutions to their problems, this Court has been "reluctant to disallow the States to experiment further and to seek in new and different ways" for answers. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 547 (1971) (juvenile justice). See also *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973) (parole). Amici Attorneys General respectfully submit that unless and until Congress acts to assert jurisdiction over cable, regulatory policies to encourage diversified cable programming suited to local needs should be limited only by the broad parameters of the First Amendment.

If the Court's decision herein turns on statutory construction of the Communications Act, it would have no necessary effect on State regulation under different statutes. Because both the factual question of how limited cable channels are, see p. 10 *supra*, and the legal question of how access to them is regulated, vary from State to State, see pp. 9-14, 28-9, *supra*, and nowhere are the same as

---

[50] For State-by-State discussions of the variety of regulatory systems, see Hochberg, *The States Regulate Cable: A Legislative Analysis of Substantive Provisions*, Publication P-78-4 (Harvard Univ. July 1978), pp. 9-17, 38-48, 59-61, 73-76; Briley, *Survey of Franchising and Other State Law and Regulation on Cable Television* (FCC 1976), *passim*.

for broadcast media, any Constitutional holdings herein on Federal regulation of radio might not properly apply to State regulation of cable television systems.

Unless this Court overturns its prior decisions, see Point I *supra*, to find consideration of format in licensing decisions always to be unconstitutional, amici Attorneys General respectfully submit that the Court should leave the States free to explore the various possible approaches for such regulation, see pp. 9-14, 23-4, 28-9 *supra*, by explicitly noting that its decision herein does not necessarily apply to cable.

CONCLUSION

The decision below should be affirmed.

Dated: New York, New York
August 29, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel•

• CYRIL PENN, Legal Intern
assisted on the brief